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SENATE BILL 642
By Cooper J

AN ACT to amend Tennessee Code Annotated, Section 71-5-117, relative to subrogation in medical assistance.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 71-5-117, is amended by deleting the section in its entirety and by substituting instead the following:

(a) Medical assistance paid to, or on behalf of, any recipient cannot be recovered from a beneficiary unless such assistance has been incorrectly paid, or, unless the recipient or beneficiary recovers or is entitled to recover the third party reimbursement for all or part of the costs of care or treatment for the injury or illness for which the medical assistance is paid. To the extent of payments of medical assistance, the state shall be subrogated to all rights of recovery, for the cost of care or treatment for the injury or illness for which medical assistance is provided, contractual or otherwise, of the recipients against any person. Medicaid payments to the provider of the medical services shall not be withdrawn or reduced to recover funds obtained by the recipient from third parties for medical services rendered by the provider if these funds were obtained without the knowledge or direct assistance of the provider of medical

assistance. When the state asserts its right to subrogation, the state shall notify the recipient in language understandable to all recipients, of the recipient's rights of recovery against third parties and that the recipient should seek the advice of an attorney regarding those rights of recovery to which the recipient may be entitled. If, while receiving assistance, the recipient becomes possessed of any resource or income in excess of the amount stated in the application provided for in this part, it shall be the duty of the recipient immediately to notify the agency designated to determine eligibility under this part of the receipt or possession of such resource or income. When it is found that any person has failed to so notify the agency that such person is or was possessed of any resource or income in excess of the amount allowed or when it is found that, within three (3) years prior to the date of the recipient's application, a recipient made an assignment or transfer of property for the purpose of rendering the recipient eligible for assistance under this part, any amount of assistance paid in excess of the amount to which the recipient was entitled shall constitute benefits incorrectly paid. Any benefits incorrectly paid shall be recoverable from the recipient, while living, as a debt due to the state and, upon the recipient's death, as a claim classified with taxes having preference under the laws of this state.

(b) Upon accepting medical assistance, the recipient shall be deemed to have made an assignment to the state of the right of third party insurance benefits to which the recipient may be entitled. Failure of the recipient to reimburse the state for medical assistance received from any third party insurance benefits received as a result of the illness or injury from which the medical assistance was paid may be grounds for removing the recipient from future participation in the benefits available under this part; provided, that any removal from participation shall be after appropriate advance notice to the recipient and that the provider of service shall not be prevented from receiving payment from the state for medical assistance services previously furnished the

recipient, and that nothing herein shall require an insurer to pay benefits to the state which have already been paid to the recipient.

(c) The right of subrogation by the state to the recipients' right to recovery shall be subject to ordinary and reasonable attorney fees; provided, that further, where a recipient has retained an attorney, the attorney shall not be considered liable unless the attorney has notice of the state's claim of subrogation prior to disbursement of the funds to the recipient. Notice shall be constructive or actual. Notice may include a notification from the individual managed care organization under contract with the state or any medical records or bills reflecting a pending or paid claim by TennCare or the individual managed care organization.

(d) The commissioner of health or individual managed care organizations under contract with the state are authorized to require certain information identifying persons covered by third parties for medical services. Third parties for medical services shall include, but not be limited to, health and liability insurers, administrators of ERISA plans, employee welfare benefit plans, workers' compensation plans, CHAMPUS and Medicare. All third parties shall, upon request from the commissioner or managed care organization, provide for a computerized data match of their respective files to identify all persons covered by both the third party and by the state's TennCare program for medical services. No third party shall be liable to a policyholder for proper release of this information to the commissioner or managed care organization. Such information shall be provided pursuant to a written request from the commissioner or managed care organization with each third party establishing confidentiality requirements. By submitting such a request, the state or managed care organization agrees to reimburse the third party for reasonable costs incurred by the third party in compiling and providing the data.

(e)

(1) To the extent necessary to reimburse the department for expenditures for its costs for services provided for any child eligible for medical services under title XIX of the federal Social Security Act, the department shall have a right of action against, and shall be permitted to garnish the wages, salary or other employment income of, any person who:

(A) Is required by a court or administrative order to provide coverage of the costs of health services to a child who is eligible for medical assistance under title XIX of the federal Social Security Act;

(B) Has received payment from a third party for the costs of such services provided to such child; and

(C) Has not used such payments from the third party to reimburse, as appropriate, either the other parent or guardian of such child or the provider of such services.

(2) The claims by the department for the costs of such services shall be subordinate to any claims for current or past-due child support.

(f) The state's right of action under this section shall be authorized as part of the contractual functions of the individual managed care organization which incurred the medical expenses on behalf of a TennCare recipient where the TennCare program deems appropriate.

(g) Before the entry of the judgment or settlement in a personal injury case, the plaintiff's attorney shall contact the state (or any entity acting pursuant to subsection (f)), in order to determine if the state has a subrogation interest. When litigation is pending, the plaintiff's attorney shall then inform the court regarding the results of such attorney's contact with the state. After trial and at the time of the entry of the judgment in a case in which the state (or any entity acting pursuant to subsection (f)) has a subrogation interest under this section, it is the responsibility of the trial judge to calculate the amount

of the subrogation interest and incorporate the court's findings concerning the subrogation interest in the final judgment. The gross amount of the subrogation interest shall be based upon the findings of the jury concerning medical expenses and evidence introduced after the trial about the total sum of moneys paid by the state (or any entity acting pursuant to subsection (f)) for medical expenses for injuries arising from the incident that is the basis of the action. The gross amount of the subrogation interest shall be reduced as follows:

(1) To the extent that the plaintiff is partially at fault in the incident giving rise to the litigation, the subrogation interest is reduced by the percentage of fault assessed against the plaintiff;

(2) To the extent that the finder of fact allocated fault to a person who was immune from suit, the subrogation interest is reduced by the percentage of fault assessed against the immune person;

(3) To the extent that the finder of fact allocates fault to a governmental entity that has its liability limited under state law and the fault of the entity (when multiplied by the total dollar value of the damages found by the finder of fact) exceeds the amount of judgment that can be awarded against the entity, the subrogation interest is reduced proportionately by a percentage derived by dividing the uncollectable portion of the judgment against the governmental entity by the total damages awarded; or

(4) To the extent that the finder of fact allocated fault to a person that the plaintiff did not sue, the subrogation interest is reduced by the percentage of fault assessed against the non-party.

(h) After these calculations are performed, the judge should further reduce the subrogation interest pro rata by the amount of reasonable attorney's fees and litigation costs incurred by the plaintiff in obtaining the recovery as required in subsection (c).

(i) The amount determined after performance of the calculations in subsections (g) and (h) is the net subrogation interest. If the plaintiff or plaintiff's attorney collects the judgment or settlement, each has the obligation to promptly remit the net subrogation interest (and attorney's fees and costs to any counsel employed by the state or managed care organization). In the event that the plaintiff and such plaintiff's attorney collect only a portion of the final judgment, each has the obligation to promptly remit a pro rata share of the net subrogation interest (and attorney's fees and costs to any counsel employed by the state or managed care organization) as required by the final judgment. In the event that the plaintiff or plaintiff's attorney later collect additional moneys against the judgment or settlement, there is a continuing obligation on both of them to remit a pro rata share of the moneys collected as required by the final judgment.

(j) In the event that a settlement is reached and the parties and the state or managed care organization are unable to reach an agreement on the amount of the subrogation interest, the trial judge shall hold a hearing to determine the gross and net subrogation interests, taking into account the criteria listed in subsections (g) and (h) and the likelihood of collecting any settlement against parties determined to be at fault. Any aggrieved party may appeal the court's decision.

(k) It is the intention of the general assembly that subsections (g) through (j) be used in lieu of application of the "made whole" doctrine for any recovery authorized under this section.

SECTION 2. This act shall take effect July 1, 2003, the public welfare requiring it.